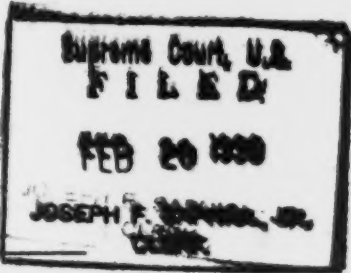


89- 1465



NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

TERM COMMENCING FEB. 20, 1990

DANIEL KOZAK,  
PLAINTIFF.

VS.

UNITED STATES DEPARTMENT  
OF AGRICULTURE  
DEFENDANT

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

Daniel Kozak  
59 Priscilla Avenue  
Deer Park, New York 11729  
(516) 667-2521  
PRO SE

(Note: The USDA facility involved herein  
is the PLUM ISLAND ANIMAL DISEASE CENTER,  
located one mile off the end of the North  
Fork of Long Island, assessable only by  
vessel or helicopter.)



## QUESTIONS PRESENTED

The questions presented for review:

1. Was it proper for the United States District Court for the Eastern District of New York to uphold a federal agency in denying an eligible employee the right to union representation during adverse actions against him?
2. Was it proper for the United States District Court for the Eastern District to uphold a federal agency in its denial of an employee's right to privacy on the job. That is, a secure place to keep personal items and documents, such as a filing cabinet?
3. Was it proper for the United States District Court for the Eastern District



to uphold a federal agency in denying an employee a hearing prior to issuing a severe letter of reprimand?

4. Was it proper for the United States District Court for the Eastern District to uphold a federal agency in denying a handicapped employee a federal medical officer's evaluation of requested "handicap accommodations"?

5. Was it proper for the United States District Court for the Eastern District to condone a federal agency's isolation of a tenured employee from his civil service duties?

6. Was it proper for the Court of Appeals for the Federal Circuit to affirm the Eastern District Court Decision and Order which was based on misinformation, inconsistencies and on glaring omissions of fact?



## TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED . . . .	i
TABLE OF CONTENTS . . . .	iii
<del>APPENDIX LIST</del>	v
OPINIONS BELOW . . . . .	1
GROUND FOR JURISDICTION . .	3
JURISDICTION . . . . .	3
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED .	3
U.S. Constitution	
Amendment V . . . . .	3
Federal Rules of Civil Procedure 52(a) - portion thereof . . . .	4
STATEMENT OF FACTS . . . .	5
STATEMENT OF THE CASE . . .	6
I. PLUM ISLAND IS A CONTAGIOUS <u>FEDERAL OUTPOST - ISOLATED</u>	6





II. PLUM ISLAND VESSELS NEVER FAILED TO SAIL WITHOUT <u>ADEQUATE REASON</u>	7
III. CAPTAIN DENIED BENEFIT <u>OF UNION REPRESENTATION</u>	12
IV. CAPTAIN ISSUED LETTER OF <u>REPRIMAND WITHOUT HEARING</u>	13
V. CAPTAIN FORCED TO MOVE <u>FROM CIVIL SERVICE JOB SITE</u>	14
VI. FILING CABINET SEIZURE <u>DONE WITH MALICE</u>	16
VII. DENIAL OF PROPER RELIEF THROUGH THE REHABILITATION <u>ACT OF 1973</u>	17
ARGUMENT. . . . .	19
CONCLUSION. . . . .	21



APPENDIX

## APPENDIX A:

Order of the United States  
District Court for the Eastern  
District of New York on  
motions of summary judgement  
dated April 19, 1989 in Civil  
suit No. CV 87-2399 . . . . 1a

## APPENDIX B:

Affirmation of the Court of  
Appeals for the Federal  
Circuit decided November 20, 1989  
in appeal No. 89-6140 -  
(Affirmation rendered without opinion)

1b



IN THE  
SUPREME COURT OF THE UNITED STATES

---

TERM COMMENCING FEBRUARY 20, 1990

---

DANIEL KOZAK, PRO SE  
PLAINTIF

VS.

UNITED STATES DEPARTMENT OF AGRICULTURE

---

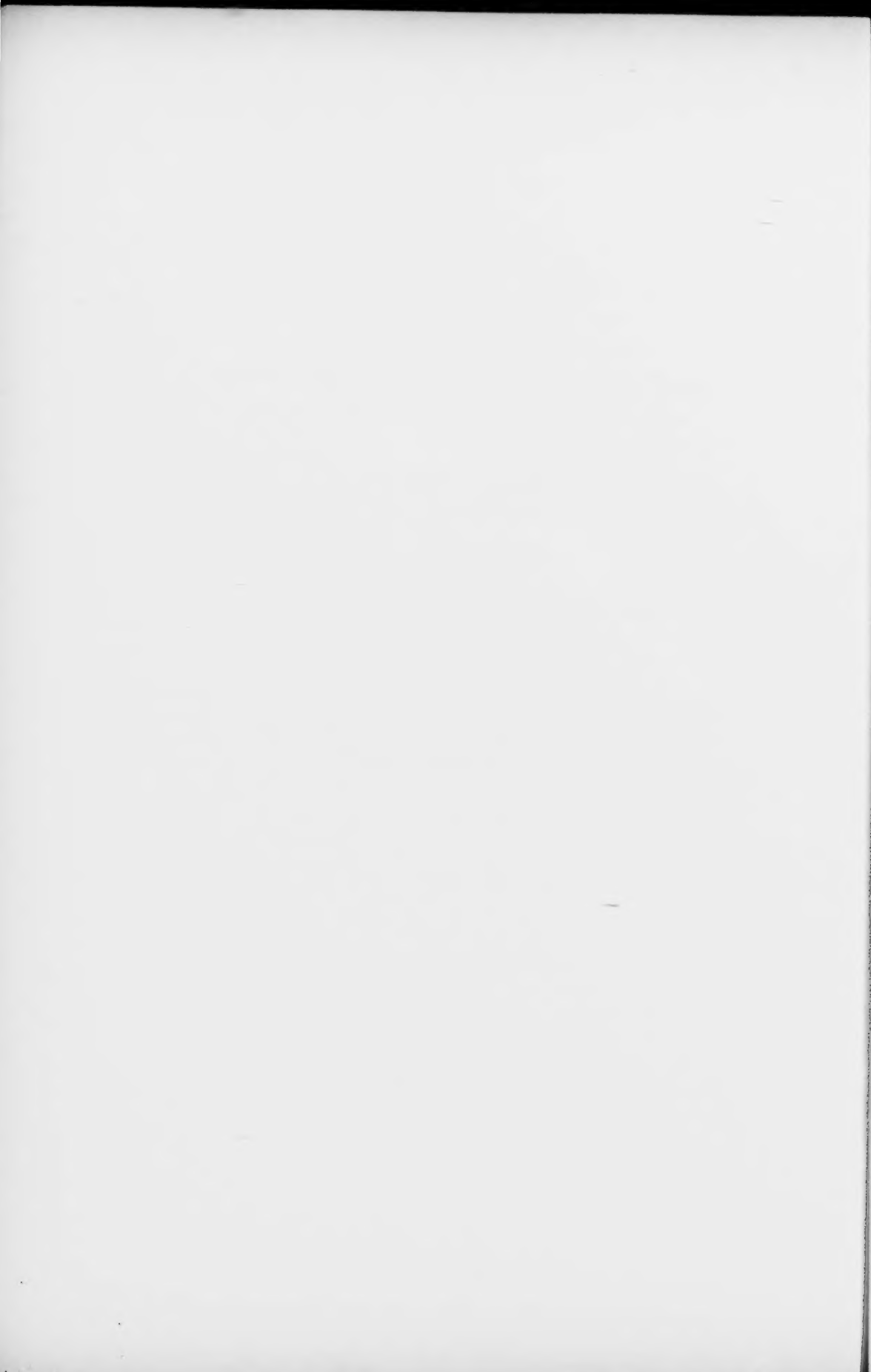
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

---

OPINIONS BELOW

This petition is based on the  
following:

1. Order of the United States  
District Court for the Eastern District



on motions of summary judgement to  
dismiss dated April 19, 1989;

2. Affirmation by the Court of  
Appeals for the Federal District on  
November 20, 1989. No opinion was  
rendered.





## GROUND'S FOR JURISDICTION

1. The date of the decision by the U.S. Court of Appeals for the Federal Circuit sought to be reviewed and the time its entry is November 20, 1989.

2. No request for rehearing was made by plaintiff.

## JURISDICTION

The jurisdiction of the Supreme Court is based on 28 U.S.C. § 1254910.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

### U.S. Constitution, Amendment V

No person shall . . . be  
deprived of life, liberty or  
property, without due process  
of law . . . .



Federal Rules of Civil Procedure 52(a)  
- portion thereof

(a) Effect . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.  
. . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).



STATEMENT OF FACTS

I was hired as Captain (Wage Marine) whose duties involved ship-board management and navigation. The position required superior maritime knowledge and experience over all other employees at the United States Department of Agriculture Plum Island Animal Disease Center, located one mile east of the North Fork off the eastern end of Long Island, New York. However, in the course of the trial by Judge Mishler, he deemed me administratively "inferior" to my shoreside non-maritime supervisor, Thomas Roslak, (Tr. p. 91) even where some very technical maritime issues were concerned. It suffices to say, Roslak and all Plum Island supervisors lacked even basic maritime knowledge and experience.



STATEMENT OF THE CASE

I. PLUM ISLAND IS A CONTAGIOUS  
FEDERAL OUTPOST - ISOLATED

The "Memorandum of Decision and Order," page 2, paragraph 2, omits the pertinence of <sup>\*</sup>Plum Island as a highly contagious outpost, divided into clean and contaminated areas. All marine personnel are in fact clean area employees for bio-safety purposes. The Captain's duty station is the clean harbor area due to his contact with animals and animal feed transported to Plum Island by boat. His assignment out of the "clean area" compromises bio-safety and emergency evacuation of the island in the event of an outbreak of infectious disease(s). Also, the Captain's

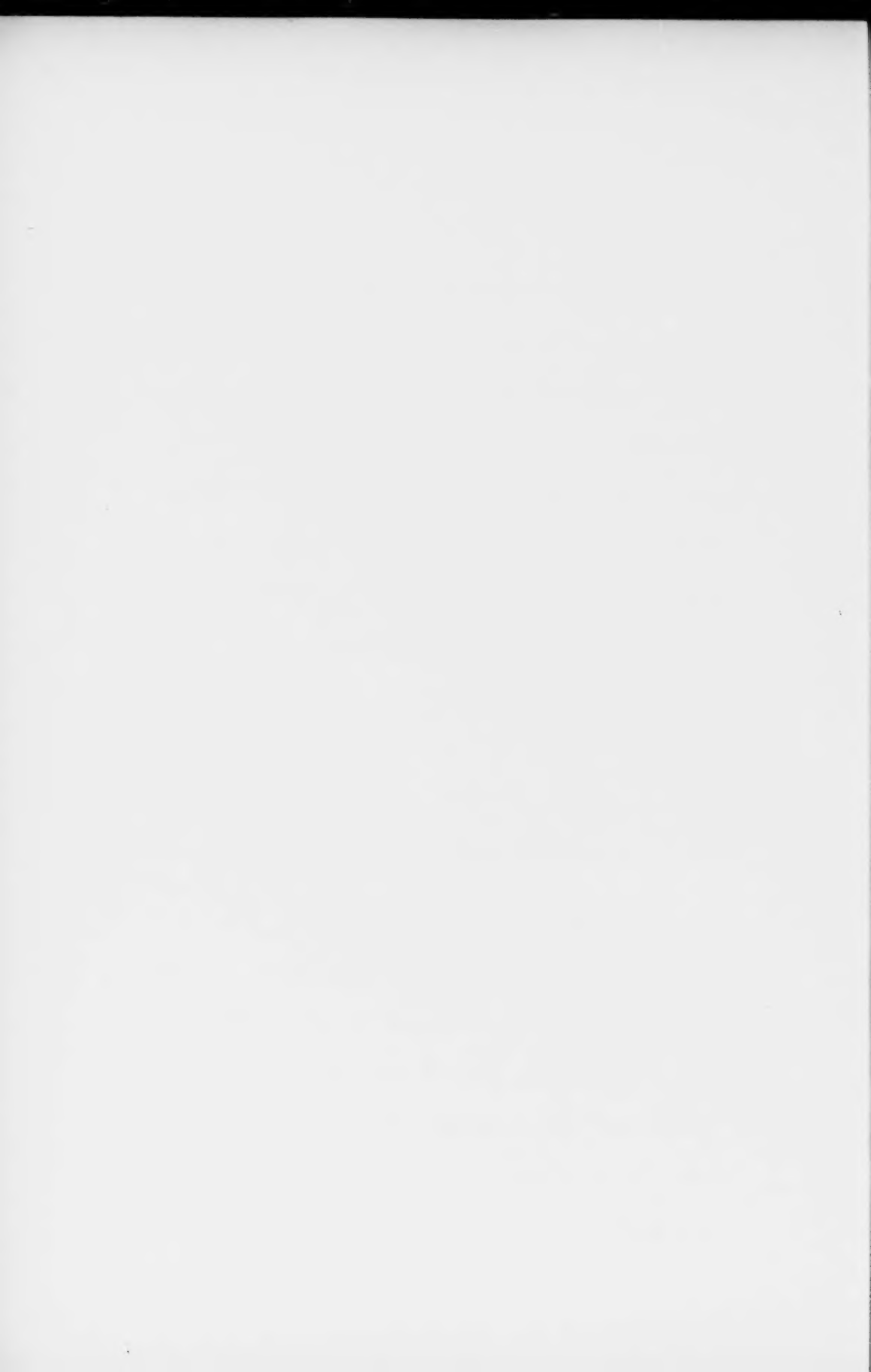




civil service position description mandates that he supervise the unloading (and loading) of vessels, which he is not able to do while assigned a mile and a half away from the (clean) harbor area. Although this was adequately demonstrated to the United States Court of Appeals through official documentation, it was not considered.

II. PLUM ISLAND VESSELS NEVER  
FAILED TO SAIL WITHOUT  
ADEQUATE REASON

Page 4, paragraph 2 of the "Memorandum of Decision and Order," infers that the vessels failed to sail due to the lack of my immediate presence to "sign off on a cover sheet" (Tr. p. 226.) This is a minor incident magnified for harassment purposes. The statement in

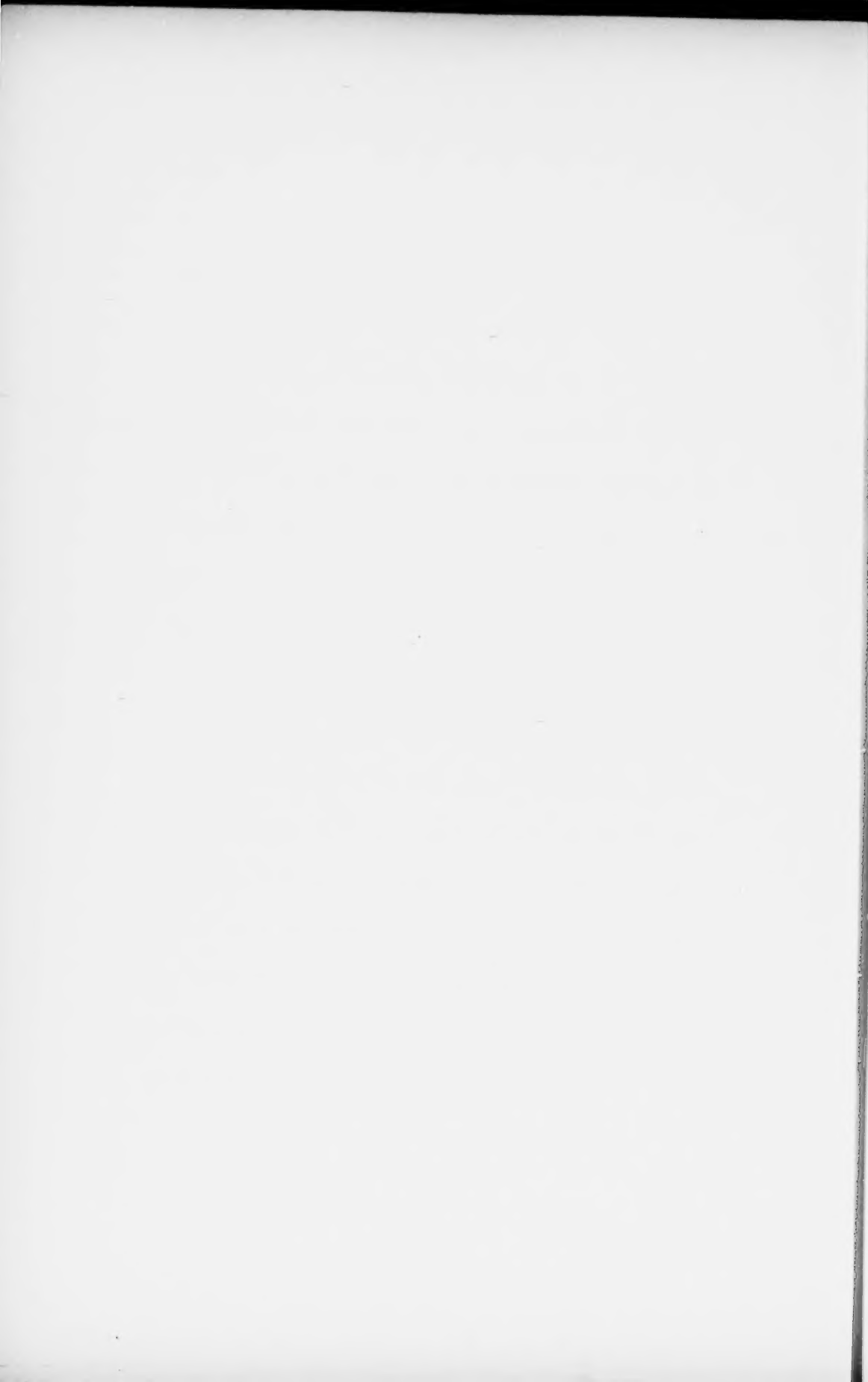


Tr. p. 226 does not justify the true facts. On this (as on many other similar occasions) Roslak "couldn't find" me because I was on a trip to the (clean) mainland area as Captain of one of the smaller vessels - to eliminate some overtime. Roslak knew this; that indeed my job took me away from my ship's telephone - in order that I could do my job adequately. The fact of the matter is my immediate signature on the document in question was of little consequence to the immediate operation of Plum Island vessels. His February 24, 1982 letter was a ruse, one of many which were to follow, particularly after 1983 when I started serving as Mr. Shien-Yie Shiau's EEO representative in his complaint against our mutual second-line supervisor, Edward Diamond, who was Roslak's first-



line supervisor. Although that letter was "self-serving" and "hearsay" - it was allowed into evidence by Judge Mishler anyway (Tr. p. 224-238.) Problems of communication between Roslak and me were often due to the fact that I was not in the pilothouse of the M/V M.S. SHAHAN much of the time. This was due to the fact that I was simply doing my job - which was direct supervision of two other vessels and crews. However, in 1983 (after I became an EEO representative to Mr. Shiau) Roslak ordered me to stay out of the pilothouse of the vessel I commanded completely. This forced me to be on my feet more often than before (and increased pressure on my back and leg problems - See Tr. p. 146/127.)

Paragraph 1, page 4 of the



"Memorandum of Decision and Order," refers to "Hasseldine" as my second-line supervisor, even after 1981. This is erroneous. Diamond was! By placing "Hasseldine" in a time-frame where Edward Diamond should be, Judge Mishler has made a decision (in part) on erroneous information. Hasseldine was not my boss after 1981. My relationships with him after that time were virtually nil. The fact of the matter is, Diamond (as Roslak's boss) was in a position to influence every adverse action Roslak had taken against me, which occurred after 1983, after I began serving as Mr. Shiau's EEO representative in his complaint against Mr. Diamond. The obviousness of this was to divert all attention away from Diamond so as not





to link him with the severe adverse actions taken against me - while I was helping Shiau formulate his EEO case against Diamond.

With reference to statements made throughout page 4 of the "Memorandum of Decision and Order," pre-1983 so-called confrontations were indeed minor in nature. Disputes between shoreside management and ship Captains are considered quite normal in the marine business. As a licensed Captain I'd become accustomed to that sort of thing; it was of little consequence. For a Captain to run a safe/efficient ship, confrontations with shoreside management are sometimes constructive. However, the increased maliciousness against me that followed mid-1983 was something else.



The marked increase in the malicious harassment after 1983 is a matter of record that Judge Mishler refused to see. It is documented in a myriad of memoranda back in my filing cabinet at Plum Island - still being held incommunicado; totally ignored.

### III. CAPTAIN DENIED BENEFIT OF UNION REPRESENTATION

My requests for union representation throughout my post-1983 harassment problems by Plum Island management were consistently denied by them - even though other Wage Marine (WM) Captains in other federal marine service operations are allowed union representation while in their capacities as shipboard managers. For example, Wage Marine (WM) civil service Captains employed aboard U.S. Naval Ships of the Military Sealift



Command (MSC) are allowed to belong to the same union as their subordinate officers who supervise various ship's departments. So are the Wage Marine (WM) civil service Captains who are employed aboard the U.S. Coast Guard ferries at Governors Island in New York. With this being the case, I was unilaterally deprived of my right to proper representation by Plum Island management while in the throes of adverse action against me.

#### IV. CAPTAIN ISSUED LETTER OF REPRIMAND WITHOUT HEARING

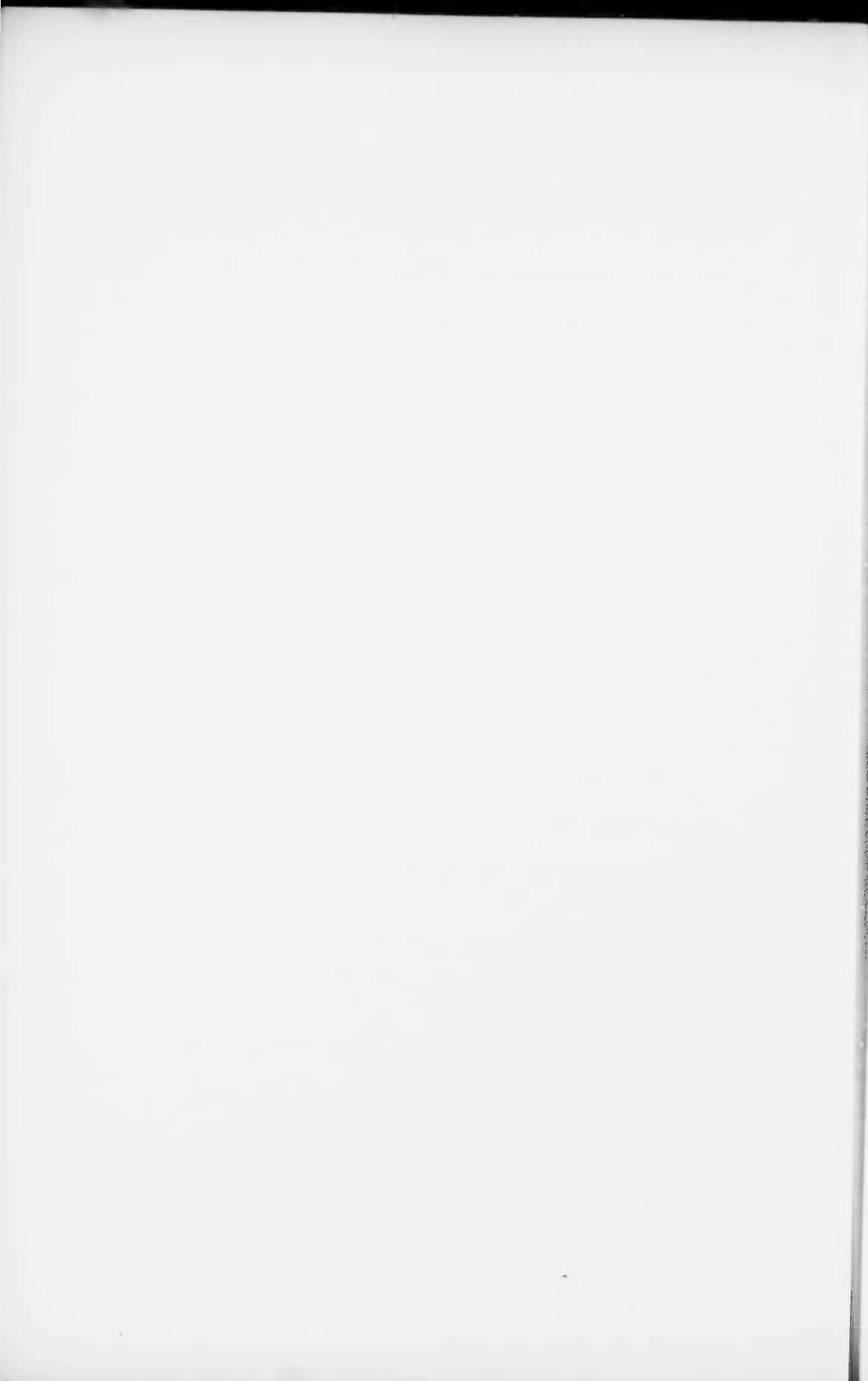
With regard to the statements made in page 8, paragraph 2 of the "Memorandum of Decision and Order," Roslak delivered a memorandum titled "E&PM 1-85" to my vessel at 4 PM, March 18, 1985 (at the close of business that day) then charged me with insubordination the following day



for not posting it immediately. Yet, "proof of compliance" was not required until March 22, 1985, three days hence. (See Tr. p. 110-114.) I, however, got a severe "Letter of Reprimand" about it on May 20, 1985 - without the benefit of prior counseling - nor was I accorded the opportunity to defend my actions at any kind of hearing. Essentially, I was found guilty without a trial. I was denied the "due process" to which I was entitled. Union representation here may have resolved the matter equitably.

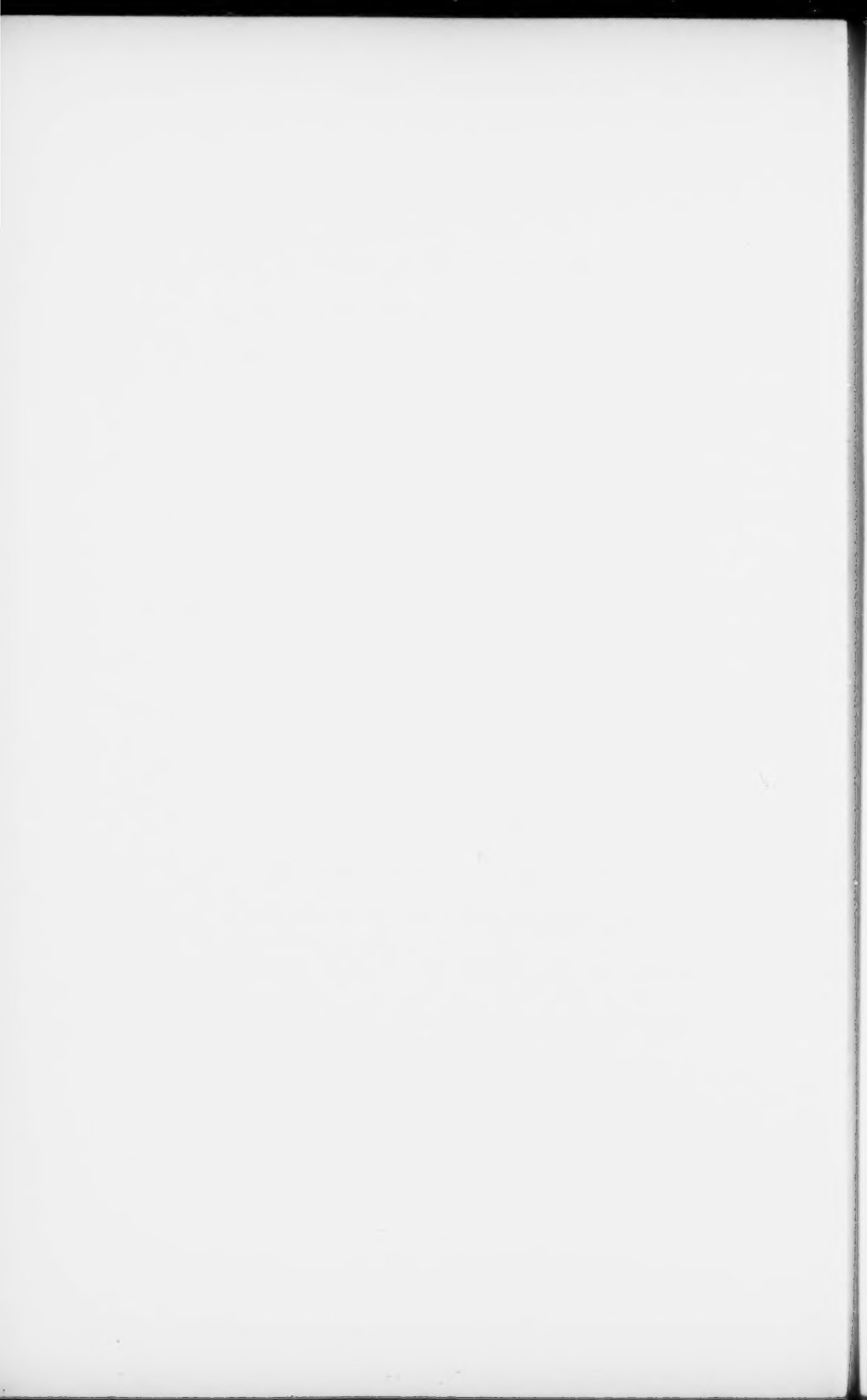
V. CAPTAIN FORCED TO MOVE  
FROM CIVIL SERVICE JOB SITE

I was forced to move from my civil service job site at the Plum Island harbor (clean area) to an inland office one and a half miles away in the





contagious area. This order altered my civil service position description, and also placed me in a position where I couldn't possibly do my job adequately. It tended to compromise bio-safety as well, in that I was often required to pilot boats carrying animals and animal feed. In effect, it compromised the USDA's own biological safety rules (established by congress.) With the Captain assigned to the contagious area an outbreak of contagious matter would quarantine him, thus leaving his ship Captainless. Plum Island management's motives here leaves much to be desired. Had I been allowed union representation this also would not have been allowed to exist. My removal from the clean harbor area tended to impede my ability to perform virtually



every important function required under my civil service position description.

VI. FILING CABINET SEIZURE  
DONE WITH MALICE

On page 9 of the Memorandum of Decision and Order, titled "THE FILING CABINET INCIDENT," Judge Mishler concedes that defendants seized my filing cabinet by first taking my key, then by sealing the files with tape to deny me access to it until they later came to remove it from my shipboard office (where it was quite adequately kept by me.) Roslak ordered me not to remove any of its contents before he scrutinized that which I wanted. He was given permission to seize the said filing cabinet by USDA Employee Relations Specialist Yvonne Steward (Tr. p. 341.) Judge Mishler



appears to have condoned the malicious and dubious manner which Roslak took the filing cabinet into his custody.

VII. DENIAL OF PROPER RELIEF  
THROUGH THE REHABILITATION  
ACT OF 1973

Page 13, paragraph 2 of the "Memorandum of Decision and Order," titled "Discrimination Based on Handicap" admits that although Roslak knew of my leg and back problems, after July, 1985, he himself presumed, unilaterally, (without professional medical advice) that "the climb up and down the ladder (i.e., the ship's stairway) to the pilothouse is more painful than the walk to a vehicle...." (See Tr. p. 153-164.) My requests, however, to be examined by a federal medical officer - and have him evaluate my list of "accommodations"



went totally ignored. I still want to know why I was refused that request. Was it because they knew he would side with me - and they would have to allow those "accommodations" I drew up to stand? That was their most vicious of all harassments, in that it precipitated the knee injury I subsequently received while alighting from my vessel. Roslak, in effect, was allowed to act as the federal medical officer, clearly overstepping his bounds, which was to cause much severe physical and mental pain for me. Judge Mishler refused to allow my "list of limited duty regimen" into evidence even though it was signed by my personnel physician. By not allowing me "reasonable accommodations" for my handicapped right leg, Roslak actually nullified my ability to perform my job with dignity and ease.





(See Tr. p. 172/164, lines 9-10.) The defendants therefore failed to sustain their burden of proving compliance with the Rehabilitation Act of 1973 in this case, in that I was not accorded the right to be evaluated by a federal medical officer. USDA's denial of proper medical "accommodations" for my leg led to an exaserbation of my ailment.

#### ARGUMENT

The judgement entered not in my favor by the District Court and affirmed by the Court of Appeals of the Federal District was made on misinformation, inconsistencies and ommissions of fact, and tends to alter the true nature of the actual circumstances of this case.



It suffices to say I was denied the following:

1. Proper union representation on the job (during adverse administrative actions, proceedings and hearings) which are accorded other supervisory Captains in similar "Wage Marine" (WM) designations in federal marine service operations.

2. Privacy on the job, such as a secure place to keep personal items and documents - in this case my filing cabinet.

3. Due process on the job during adverse actions, (a.) denied hearings prior to issuance of severe "Letters of Reprimand," (b.) no federal medical officer evaluation of "handicap accommodations."

4. Adjudication of Item 4. (D) 5. Isolation from civil service duties, as noted in "List of Documents," "Index To

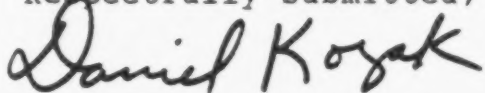


Record On Appeal," Document #1, titled  
"Complaint."

CONCLUSION

For the foregoing reasons and  
for the reasons provided at the trial  
of this action, it is respectfully  
requested that this court favor my  
first and second causes of action noted  
in my January 23, 1989 "Trial Memorandum."  
February 20, 1990

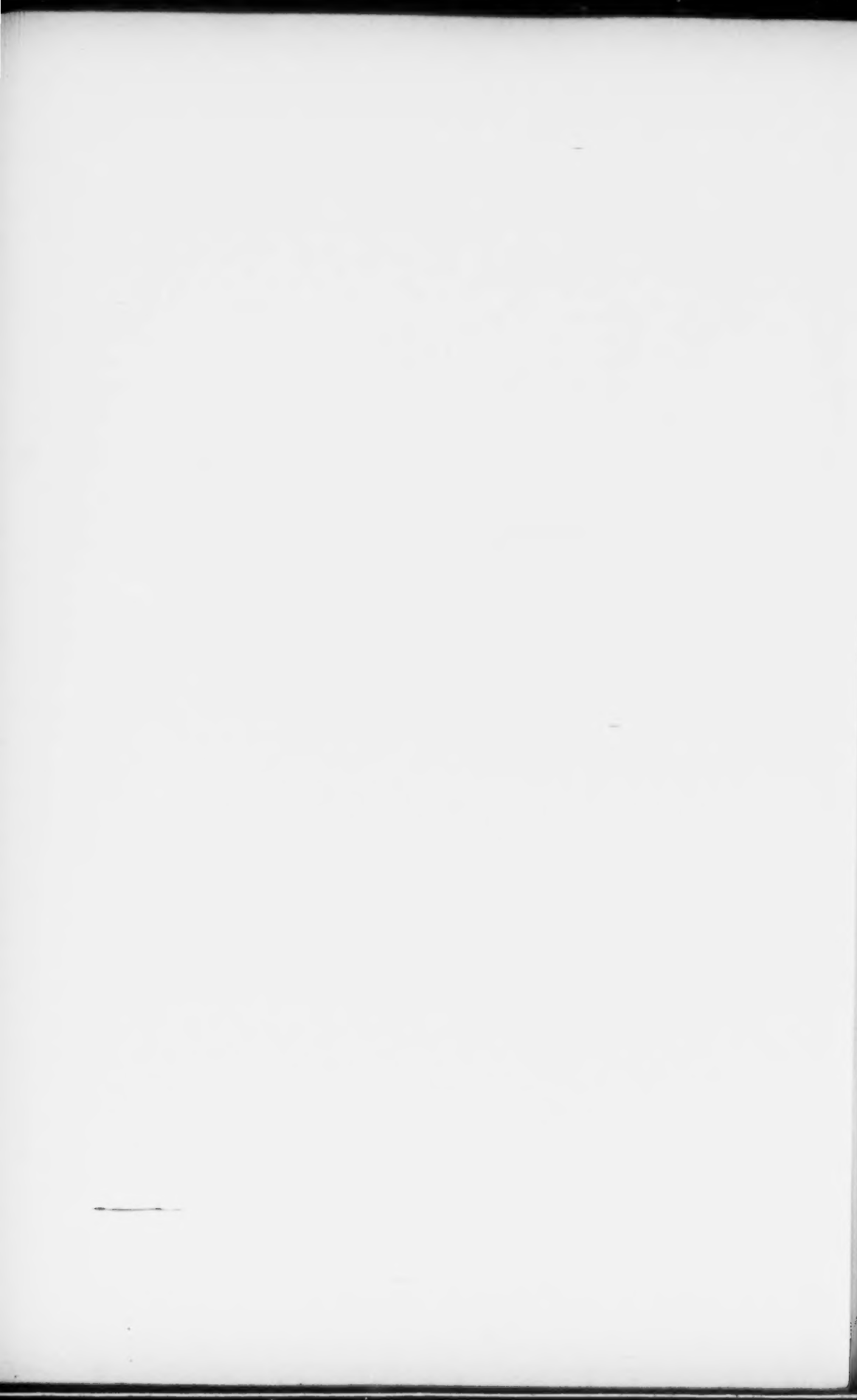
Respectfully submitted,

A handwritten signature in black ink that reads "Daniel Kozak". The signature is written in a cursive, flowing style.

Daniel Kozak, PRO SE  
59 Priscilla Avenue  
Deer Park, NY 11729  
(516) 667-2521



## APPENDIX A





APPENDIX A

1a

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
-----X

DANIEL KOZAK,

CV 87-2399

Plaintiff,

-against-

Memorandum  
of Decision  
and Order

SECRETARY, UNITED STATES  
DEPARTMENT OF AGRICULTURE,

Defendant.

April 19, 1989

-----X

A P P E A R A N C E S ;

DAVID JAMPOL, ESQ.  
Attorney for Plaintiff  
300 Rabo Drive  
Hauppauge, New York 11788

HONORABLE ANDREW J. MALONEY  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK  
225 Cadman Plaza East  
Brooklyn, New 11201  
Beth P. Schwartz, Esq.  
August V. Sellitto, Esq.  
Assistant U.S. Attorneys

MISHLER, District Judge

Daniel Kozak's pro se complaint was filed  
on July 15, 1987<sup>1</sup> asserts for damages for

---

<sup>1</sup> David R. Jampol, Esq. appeared for Kozak  
of appearance dated September 16, 1988 and  
filed on September 20, 1988.

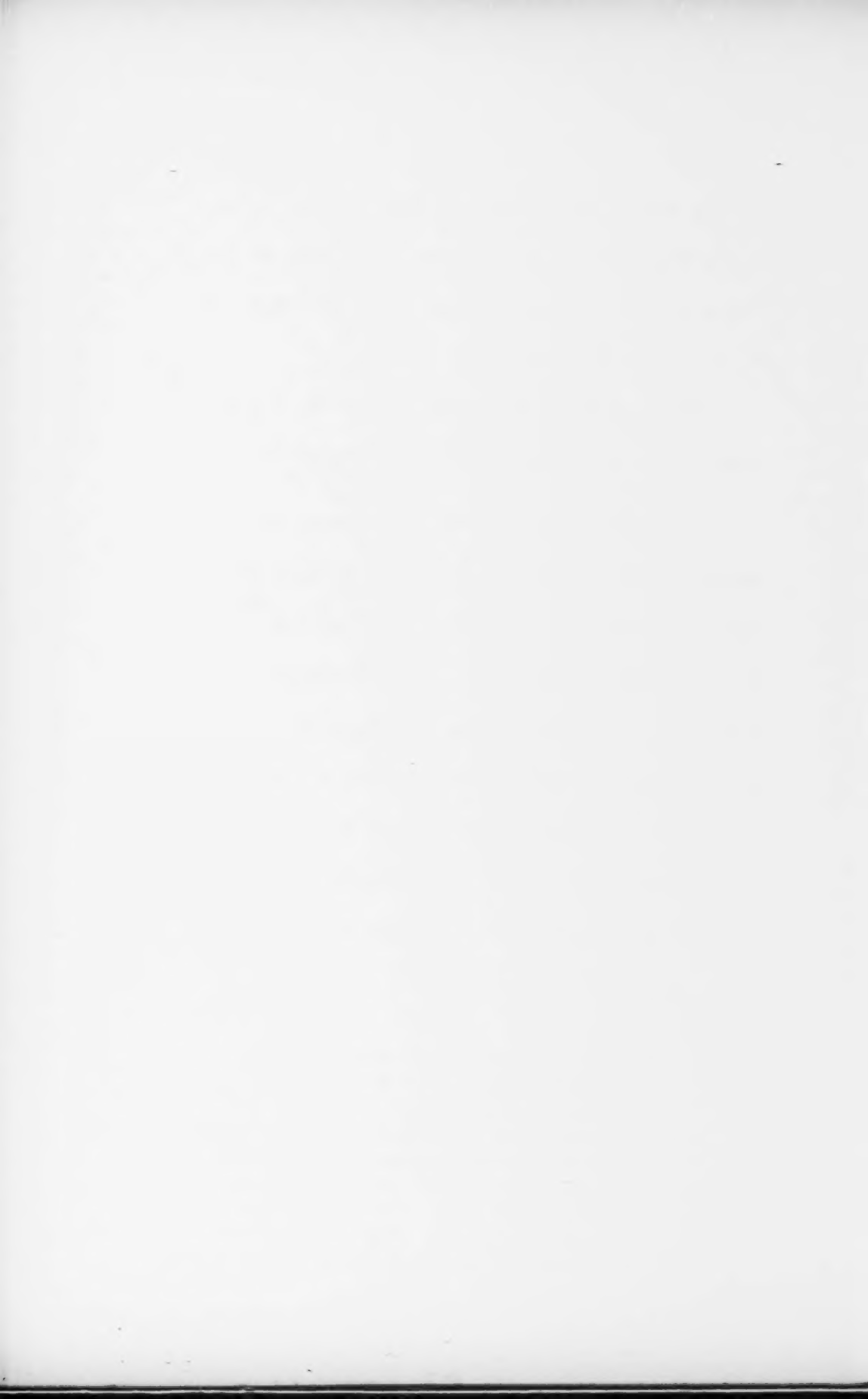


having served as an EEO representative to Shien-Yie Shiau. . . "pursuant to § 704 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a).<sup>2</sup>

The issues of fact were tried to the court without a jury. The court finds:

In 1979 Kozak, a licensed master of vessels, was hired as captain in charge of marine operations at Plum Island by the United States Department of Agriculture ("USDA"). USDA had a research program known as the Plum Island Animal Disease Center ("Center") on Plum Island. Plum Island is located off the tip of Long Island's North Fork at Orient Point. Kozak had supervision

42 U.S.C. § 2000e(a) provides in pertinent part: It shall be an unlawful employment practice for an employer to discriminate against any of his employees. . . because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title.

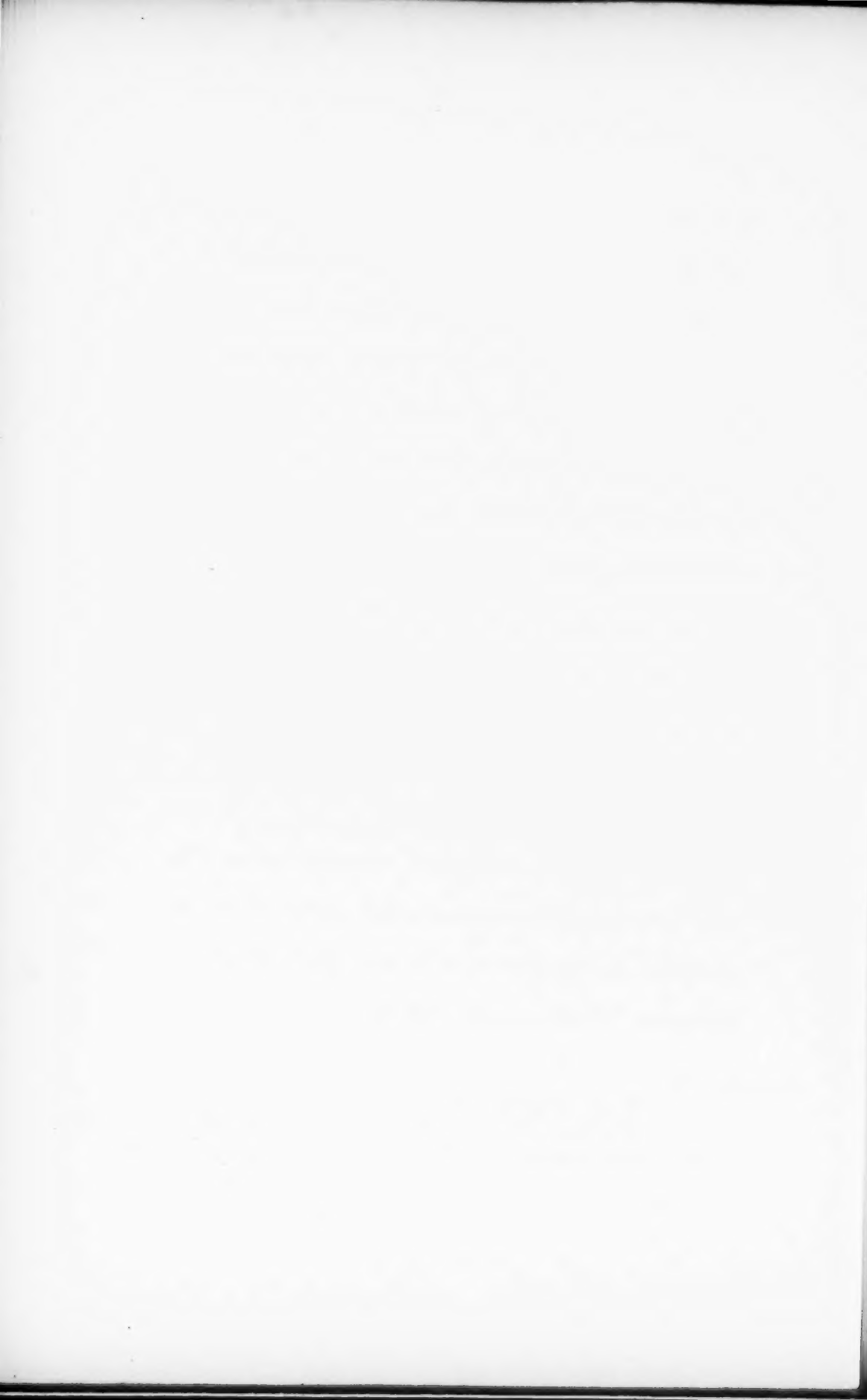


of a small fleet of vessels and personnel used in operating those vessels. The Center had approximately 150-200 employees who lived on the mainland. The vessels were used to transport employees, visitors, equipment and cattle to and from Plum Island. Kozak had the duty of supervising boat schedules and maintenance plans.

At the time Kozak was hired his immediate supervisor was Michael Bebon. Bebon assigned Kozak the duty of coordinating the work performed by a private shipyard on the vessels and the management at the Center.<sup>3</sup> Edward Hasseldine succeeded Bebon in early 1980 as Kozak's immediate supervisor. Hasseldine was assigned to the Engineering and Plant Management Division ("EPMD") of the Center and acted as the

---

<sup>3</sup> Major repairs were performed at the shipyard as well as the annual inspection and report on the condition of its vessels.



utilities superintendent for Plum Island.

Hasseldine removed Kozak as coordinator (contractor officer representative).

Hasseldine gave Kozak a poor performance appraisal. In or about March 1981, Thomas Roslak succeeded Hasseldine as Kozak's immediate supervisor in his position as utilities superintendent of Plum Island. Roslak served in that capacity until Kozak's retirement in 1986. From the time that Hasseldine assumed supervisory authority over Kozak to Kozak's retirement the relationship between Kozak and Hasseldine and Roslak involved disputes over authority of the subject matter, Kozak's performance and proper procedures.

Kozak on a number of occasions left his duty station without advising Roslak of his whereabouts. On February 24, 1982 Roslak sent a memo to Kozak directing Kozak, "In the future prior to leaving your duty station,

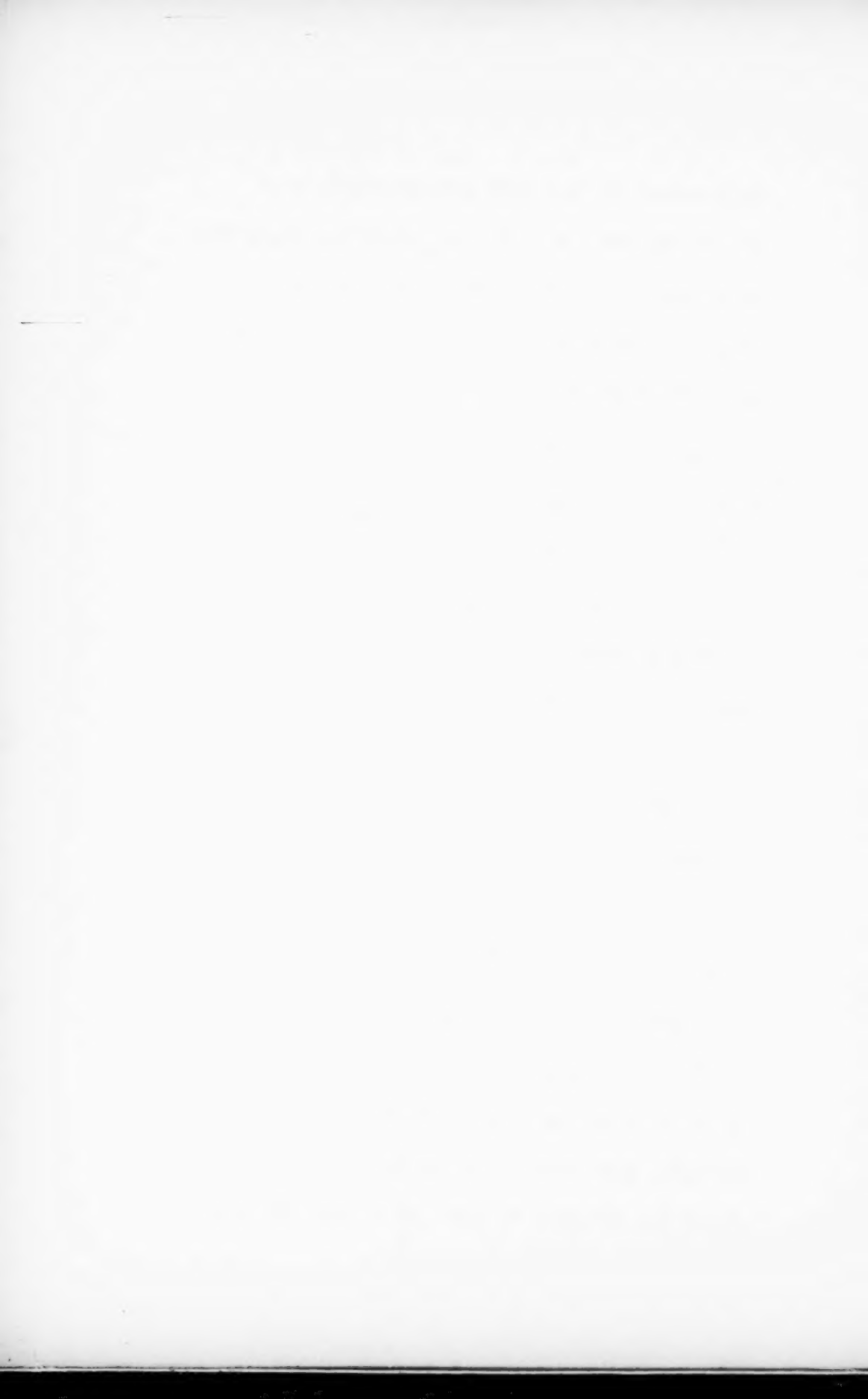




even though it has been pre-arranged, you are to contact this office." (Roslak attempted to contact Kozak to assemble a crew and "sign off on a cover sheet" so that a vessel could be operated (Tr. p. 226)).

On May 4, 1982 Roslak sent Kozak a memorandum calling Kozak's attention to the impropriety in seeking advice from someone other than Roslak or the chief of engineering plant management. Kozak's practice of refusing to abide by accepted procedures in reporting caused a constant friction prior to 1983 when Kozak became Shien-Yie Shiau's representative.

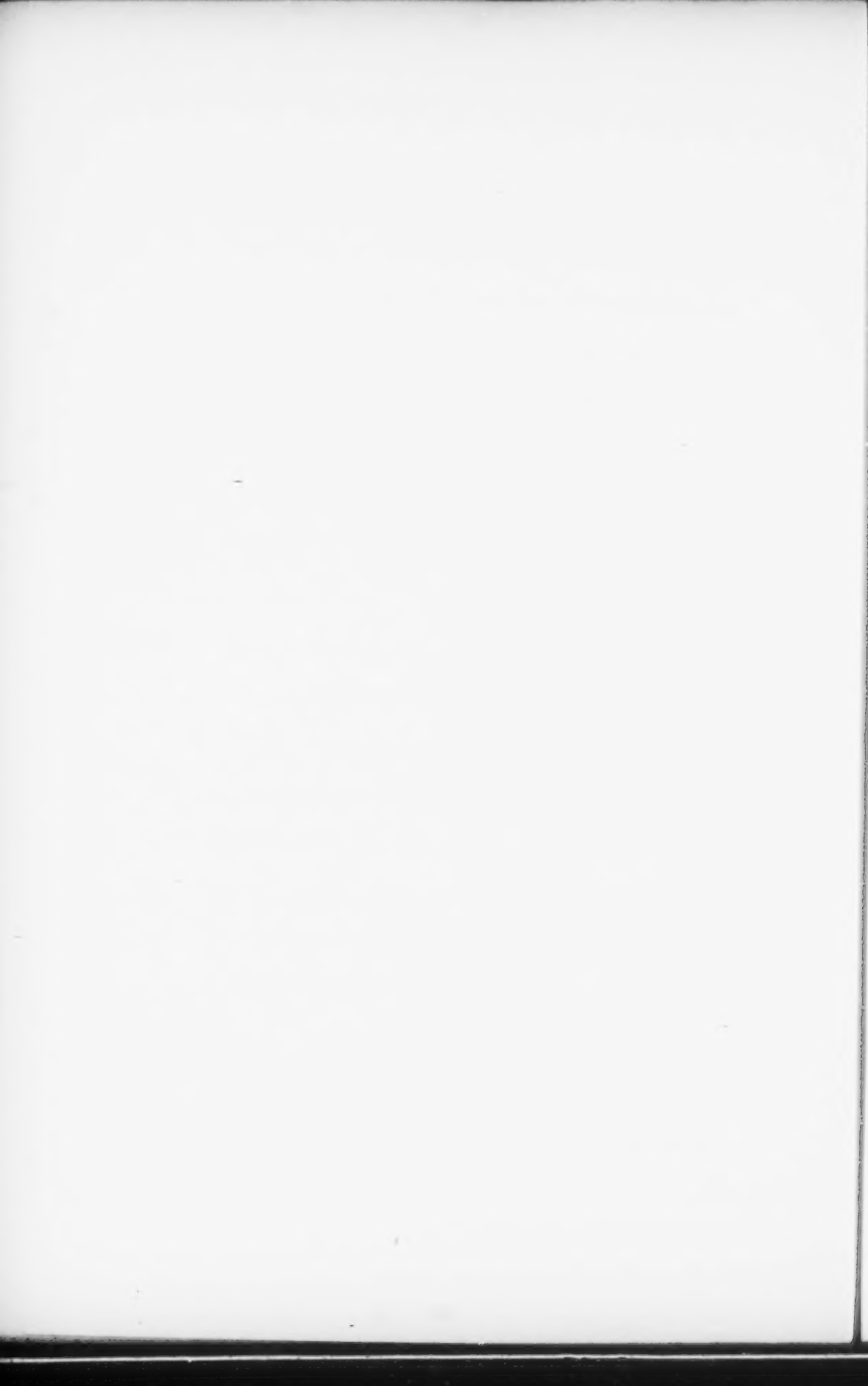
Prior to the time that Kozak represented Shiau, disputes arose between Kozak and Roslak over the authority to determine whether certain repairs were major or minor and whether they were reasonably necessary. Kozak concedes that Roslak had authority over administrative matters as they concerned transport-



ation from and to Plum Island but asserts that the ultimate decision as to what was administrative was his (Tr. pp. 179-180). Day-to-day maintenance of the vessels, including cleaning and minor repairs was within Kozak's authority. Kozak questioned Roslak's authority to determine when a repair was major and required the services of a shipyard.

In May 1982, Roslak sent Kozak a memo listing nine areas of poor maintenance of the vessels that Roslak found after "A cursory inspection...." The memo stated, "I would expect you and your people will make an indepth review of the needs of our vessels to insure the needs of continued services to the Center. Appropriate and timely action in these are expected."

Kozak did not respond. In a telephone conversation on June 18, 1982 on the subject

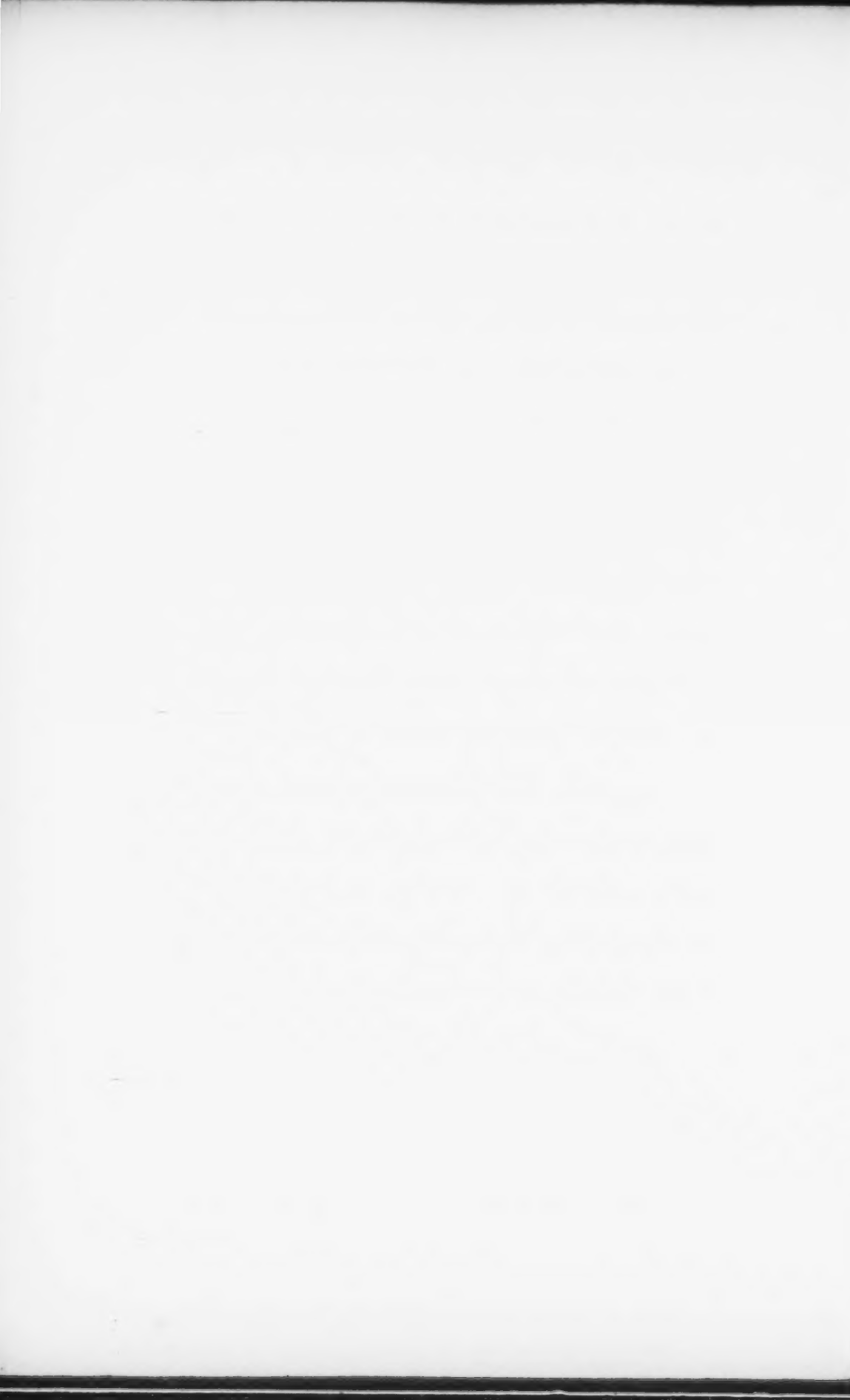


matter of maintenance of the vessels Kozak demonstrated his defiance of Roslak's orders and his contempt for Roslak by shouting at Roslak and terminating the conversation by hanging up on Roslak.

Roslak suggested that Kozak prepare a program which would include a schedule for repairs of the vessels. On "leaking port rudder post" and noted that "the area is in dire need of general maintenance. I suggest you set up a program to accomplish this."

Again on July 13, 1983, Roslak sent Kozak a memo urging him to "set up a maintenance program" and offering his "assistance in formulating the maintenance program...." Kozak refused to draft a maintenance program.

After the summer of 1983, Shiau appointed Kozak as his representative in a complaint to the EEOC. Kozak claims that incidents following that appointment sustain his claim of retaliation.



tion under § 2000e-3(a). The incidents are listed in the post-trial memorandum as:

1. intensified pressure and threats with regard to maintenance;
2. plaintiff's attempts to get discipline for Richard Gibbs and a resulting reprimand of plaintiff;
3. the development of E&PM 1-85;
4. the moving of plaintiff's office to building 54;
5. the filing cabinet incident;

We discuss the incidents listed except incident 1, which was a conclusory statement.

Richard L. Gibbs. Gibbs is an able bodied seaman under Kozak's command. A dispute arose between Gibbs and Kozak relating to an entry in a log book. Kozak called Ms. Yvonne Steward, an employee relations specialist, for guidance. She advised him that under the regulations he was required to refer the matter to Roslak. Kozak refused to send the necessary documentation concerning Gibbs to Roslak, but instead sent it

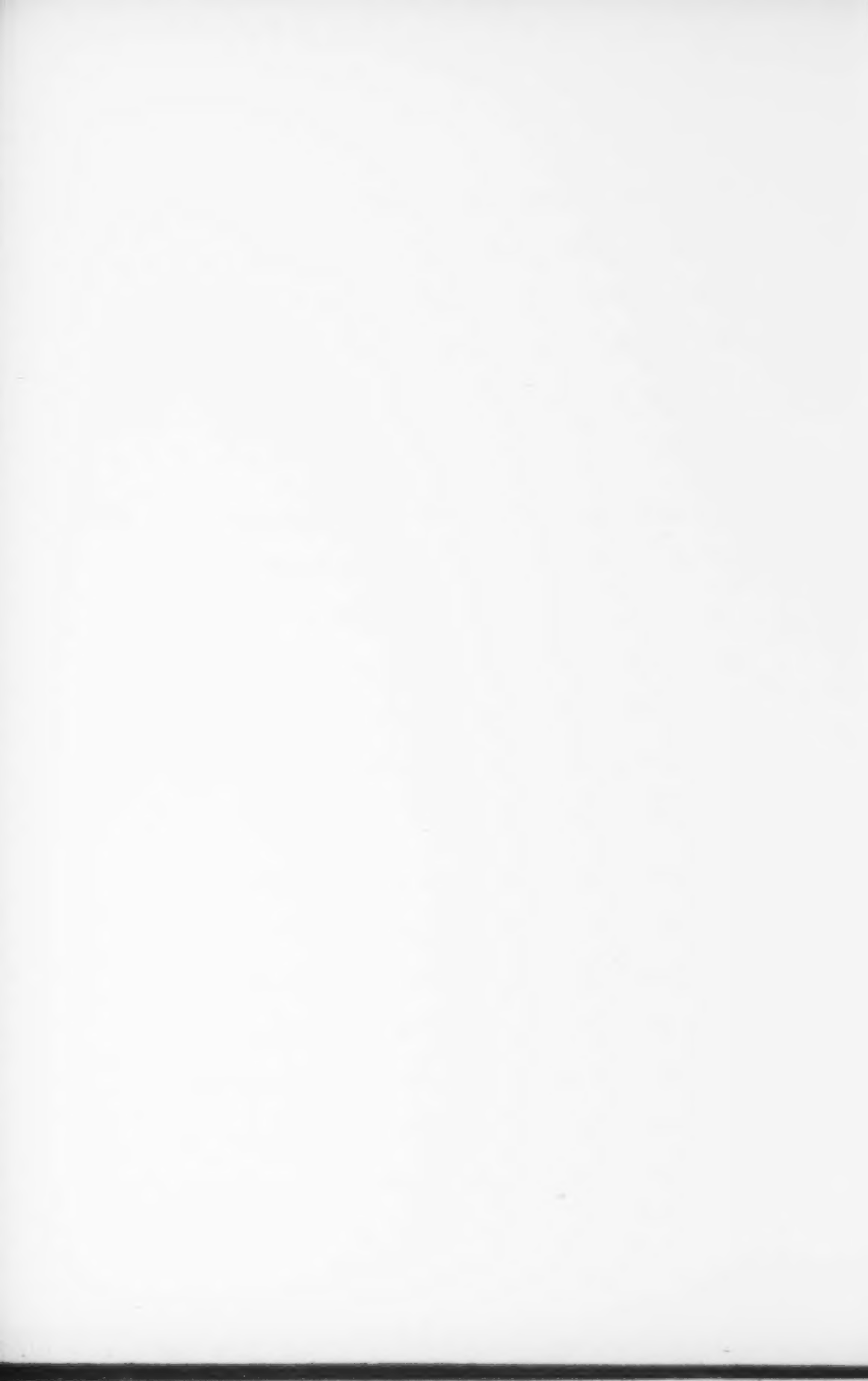




to Steward's supervisor. After it finally reached Roslak, a meeting was held with the interested parties. Gibbs was sent a letter of caution; Kozak was sent a letter of reprimand for his failure to follow the chain of command.

E&PM 1-85. A committee of government and non-government personnel was formed to inspect Plum Island concerning biological safety with a view to review the practices and procedures used to protect the livestock on Plum Island, and make recommendations to guard the well-being of the animals.

Kozak approached some of the members of the committee and apparently discussed hazards and risks in transporting animals. The committee thereupon requested a report on the authority and procedures employed by management, Kozak and employees in the marine operation in performing their respective duties. The com-



mittee suggested that the report include the duties and responsibilities of a Captain and the chain of command so that each employee would understand the chain of command.

Kozak complains that in drafting the report, Roslak paid little or no attention to his suggestions and proposals concerning his "decision making authority under his license." (Plaintiff's Memo, p.6). On March 18, 1985, the report known as E&PM 1-85 was distributed. Copies were sent to Kozak with instruction to deliver a copy to each member of the crew, receipt by crew members to be acknowledged and the report posted. Kozak was directed to submit proof of compliance with the order on March 22, 1985. Kozak failed to distribute the report and failed to post it.<sup>4</sup>

---

<sup>4</sup>

Kozak's reason for not posting the report is that there are no "official bulletin boards" on the vessels. (Tr. p. 111).



A reprimand for insubordination was issued to Kozak as a result of his refusal to comply with the order.

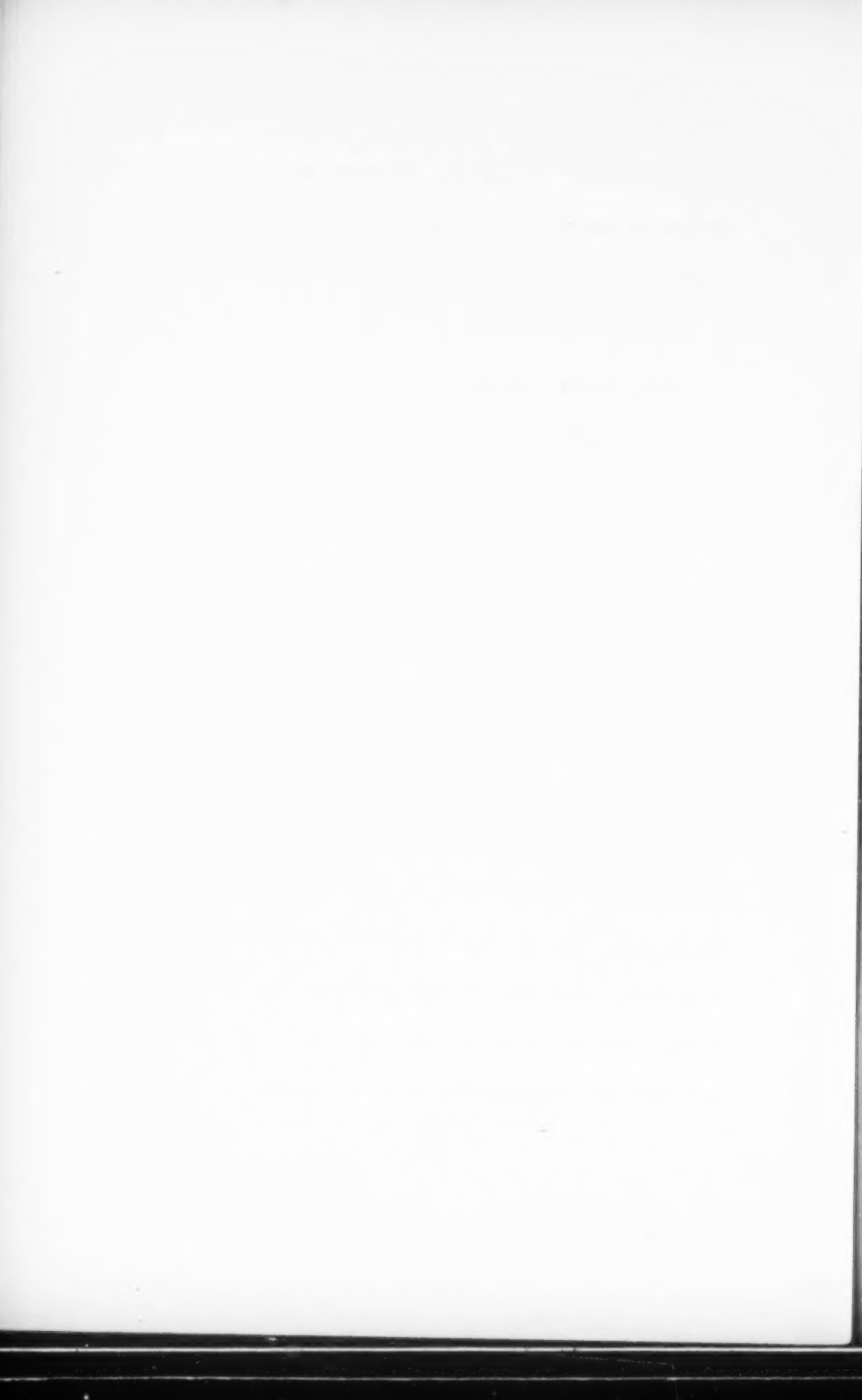
Moving Plaintiff's Office. Kozak had an office in the pilot house on the vessel M/S Shahan. In May 1984, Roslak asked Kozak to move to an office in the building numbered Building 54. In Roslak's opinion that office had services, i.e., engineering, that Kozak might use in developing a maintenance program for the vessels. Kozak refused the offer contending that he is more effective at the pilot house since his duties required decisions based on weather conditions, staffing and special trips. The pilot house was approximately six feet by seven feet. Kozak claims that the overriding reason for refusing the more commodious office at Building 54 was the difficulty he had in reaching that office which was about one and one-half miles



12a  
from the pilot house of the M/S Shahan. We find that Kozak's refusal to move to an office in Building 54 was to some extent based on the proximity of Roslak's office in the same building.

The other incident cited by plaintiff in his attempt to show retaliation is "the filing cabinet incident." The incident is related to the request to move to Building 54.

The Filing Cabinet Incident. Despite Kozak's refusal to take space in Building 54, Roslak decided to move the records from the pilot house to Building 54. Roslak telephoned Kozak in the morning of a day in May 1984 and told him he was ordered to move from the pilot house and that he would come to the pilot house that morning. Roslak came to the pilot house with Dr. John W. McVicar, director of the Office of Biosafety of the Center.





Roslak advised Kozak that he was moving the records of the Center held in the file cabinet to Building 54. Kozak advised Roslak that some of the records were not business records of the Center but personal records, and included a file on Shiau's claim of discrimination. Roslak invited Kozak to review the records in the cabinet and remove any he felt were personal records. The cabinet was locked. Kozak gave Roslak the key. The cabinet was sealed with tape and removed to the Engineering Plans & Maintenance Department of the Center. While still under seal, Kozak removed his personal papers.

Stormberthing of Vessels. A stormberthing plan had been in existence at Plum Island. It provided a relative safe place for berthing vessels during the hurricane season. In 1983 and 1984, Roslak asked Kozak to arrange for



drills for tying up vessels during a hurricane. Kozak believed the drills were useless and so advised his superiors. Roslak met with licensed marine personnel to get their reaction and assessment for storm-berthing vessels. Kozak submitted a list of questions relating to the evaluation of the stormberthing plan and ordered them to answer the questions. When Roslak learned of Kozak's order, he directed Kozak to desist.

In 1985 the hurricane season brought Hurricane Gloria. With the warning of its destructive force, Kozak advised Roslak that he felt the berth provided for the M/S Shanahan was inadequate. Kozak, with Roslak's consent, opted for a berth in New London, Connecticut.<sup>5</sup> (see footnote next page)

#### DISCUSSION

We assume for this discussion that Kozak has made out a prima facie case of retaliation



for his representation of Shiau<sup>6</sup> and that the burden of showing that the reason for the alleged adverse action was non-discriminatory. The employee would then have the burden of persuading the fact finder that the reason advanced by the employer is pretextual. McDonnell Douglas v. Green, 411 U.S. S. Ct. 1089, 1096 (1981).

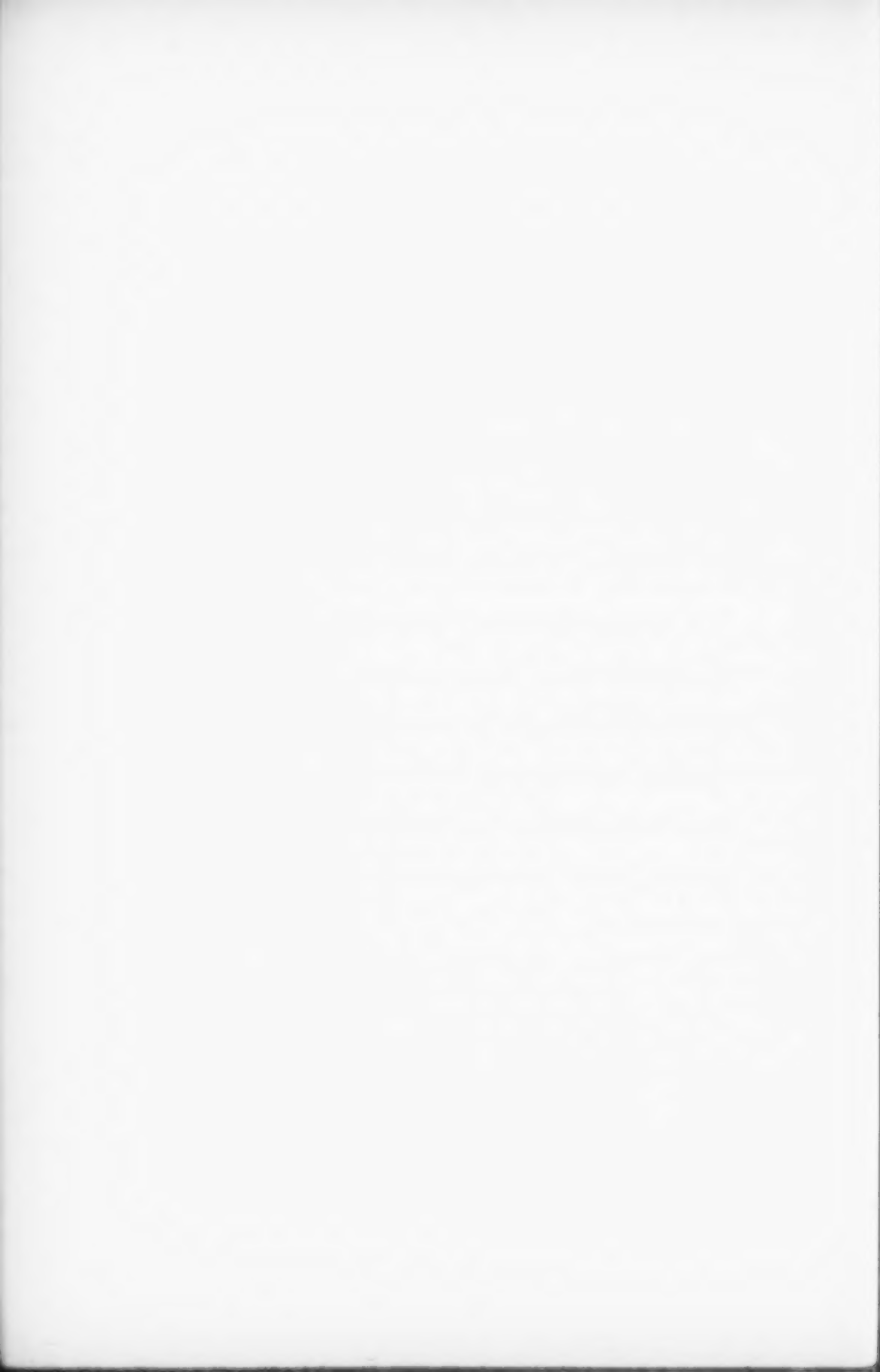
We are faced with the frequent problem discussed in Brock v. Casey Truck Sales, 839 F. 2nd 872 (2d Cir. 1988) in determining whether the employer has offered multiple legitimate motives for the alleged adverse action. If so the burden of persuasion is on

---

<sup>5</sup> Kozak would have us believe that but for his decision to berth the M/S Shahan in New London, the ship would have been severely damaged or totally destroyed by Hurricane Gloria. However, the M/S Plum Isle occupied the berth to which the M/S Shahan had been assigned and weathered the storm without damage.

---

<sup>6</sup> The court dismissed Shiau's claim of discrimination in a memorandum of decision and order dated this day.

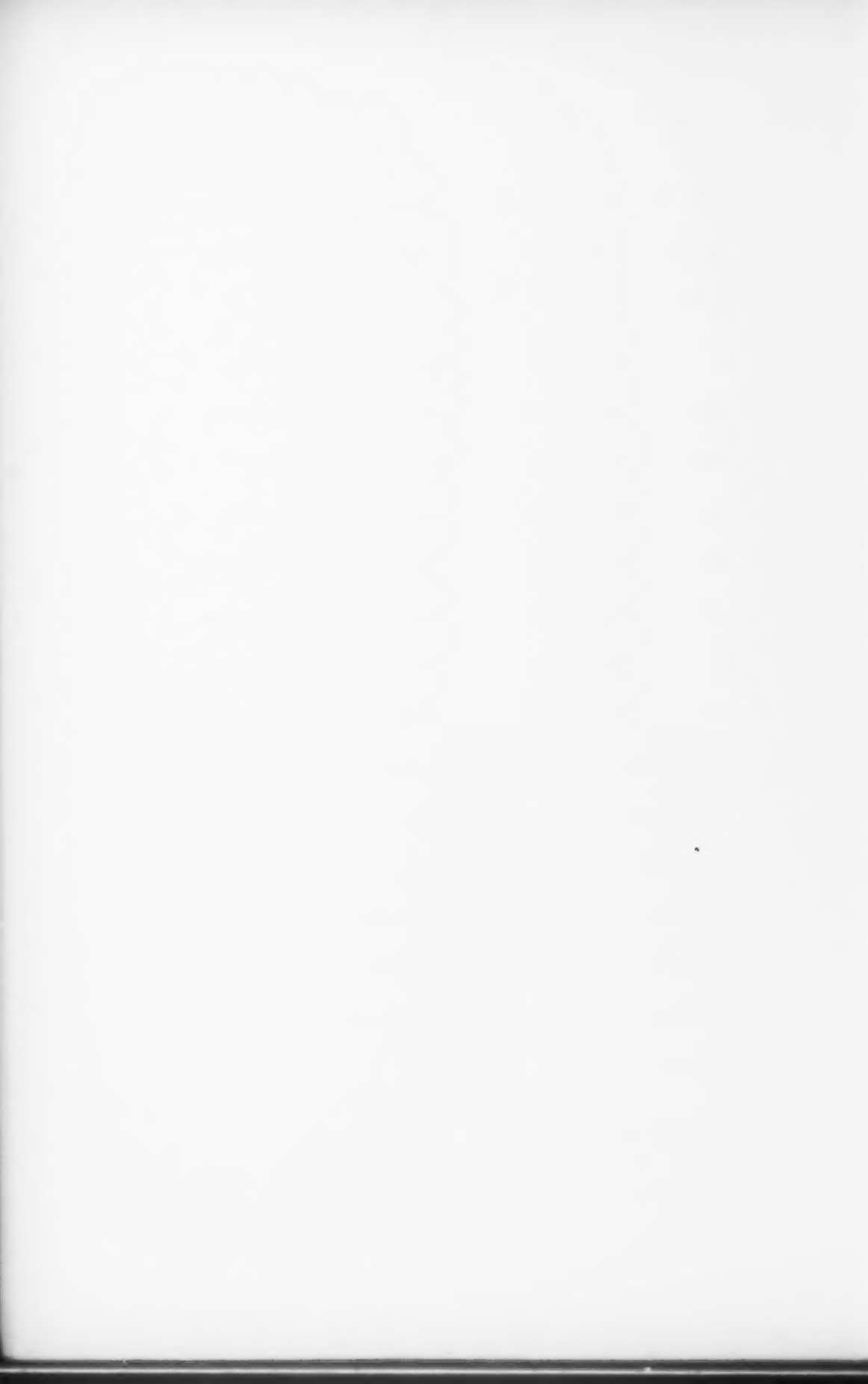


the employer. Mt. healthy City School Dist. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977).

We find that the above incidents and the incident discussed below under Discrimination Based on Handicap, all of which Kozak claims to be harassment were the result of a dispute with Hasseldine and Roslak over the area of the authority of each. The history of the dispute goes back to at least early 1981. It did not intensify after Kozak was retained to represent Shiau. The defendant has sustained the burden of proving that the alleged harassment of Kozak was not in retaliation for such representation and that Hasseldine's acts and Roslak's acts would have been the same even if Kozak had not represented Shiau.

#### Discrimination Based on Handicap

In or about April 1983 Kozak suffered an





injury to his spine (herniated disc at the lumbro-sacral area). Kozak also also suffered from a circulatory deficiency in his leg. The injury caused pain in the right leg when walking or standing for extended periods of time. Kozak did not reveal the problem to Roslak until July 1985. Kozak suffered a further injury to his right knee in 1986.

Kozak claims that Roslak demanded the move to an office in Building 54 knowing that Kozak had difficulty reaching that office because of his physical handicap. Kozak concedes that this argument is relevant to the issue only after July 1985 when Kozak claimed the impairment as an additional reason for retaining his office in the pilot house.

Defendant argues that the climb up and down the ladder to the pilot house is more painful than the walk to a vehicle furnished

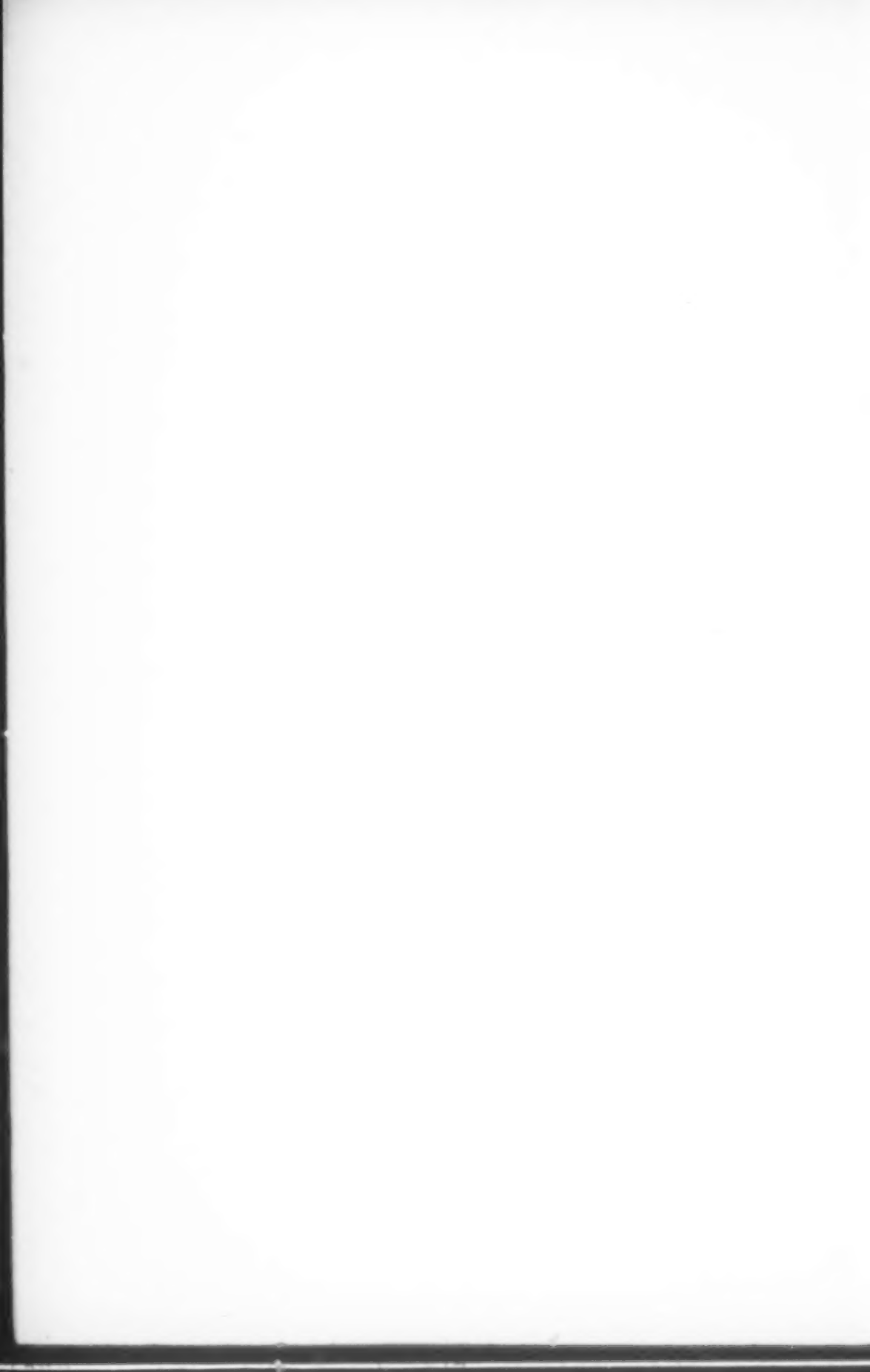


Kozak for transportation to the office in Building 54. Kozak claims the latter is more painful.

The Rehabilitation Act of 1973 (the "Act"), 19 U.S.C. § 791 et seq. placed an obligation on an employer to provide reasonable accommodation for the handicapped. Prewitt v. United States Postal Service, 662 F. 2d 292, 307 (5th Cir. 1981).

In February 1986, Kozak requested a limited duty regimen in light of his handicap. The order of February 11, 1986 directing Kozak "to report to Building 54 i your office between the hours of 1000 and 1400 where you will have the opportunity to ensure yourself, as well as those concerned, to do as the doctor has ordered" is consistant with defendant's obligation imposed under the Act.

Defendant has sustained its burden of proving compliance with the Act.

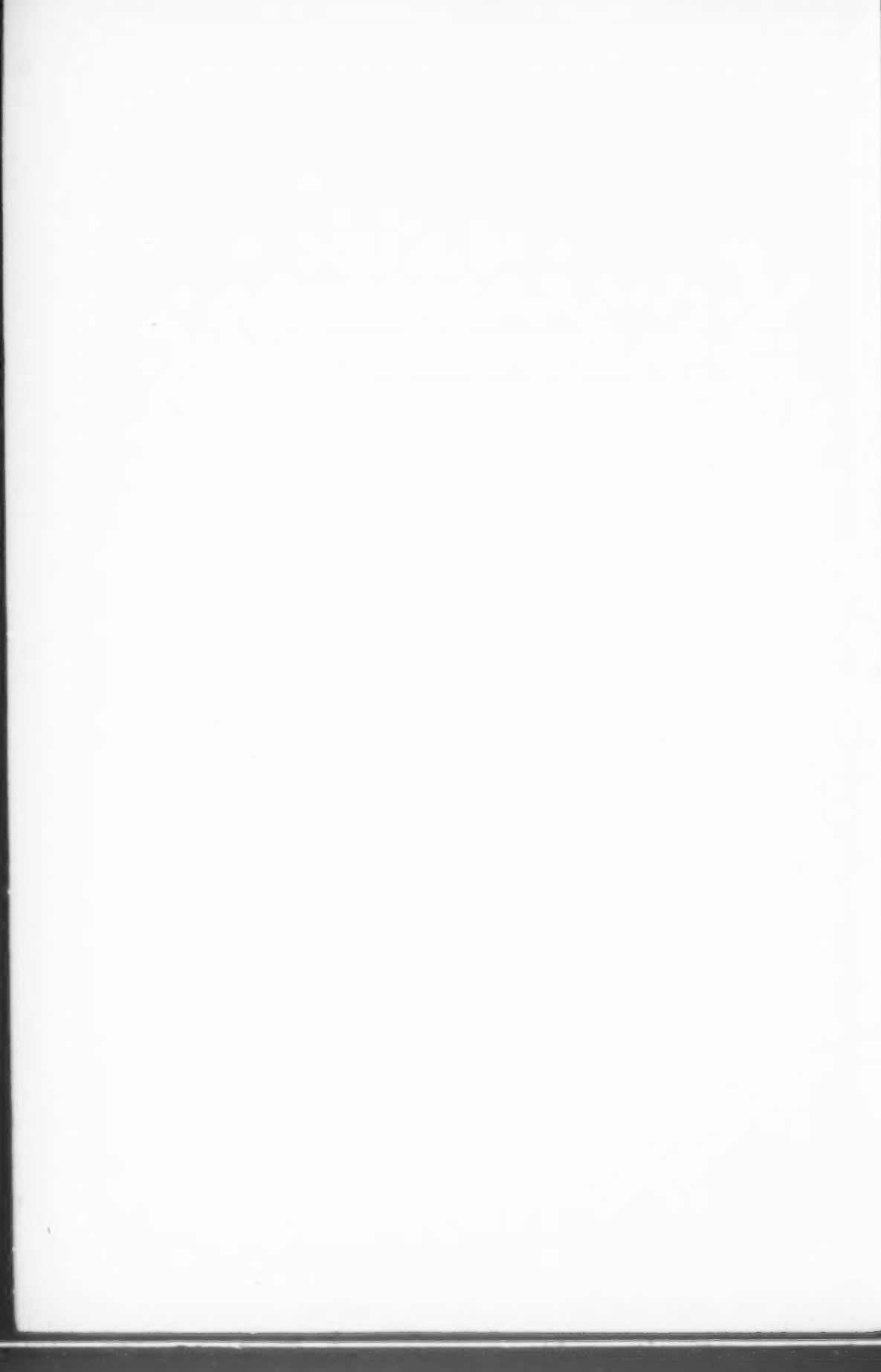


The complaint is dismissed, and it is  
SO ORDERED.

The Clerk is directed to enter judgement  
in favor of defendant and against the plain-  
tiff dismissing the complaint.

(signed) JACOB MISHLER

U. S. D. J.



## APPENDIX B





APPENDIX B

1b

WF

DC:EDNY  
DC87-cv-2358  
MISHLEL

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of November, one thousand nine hundred and eighty-nine.

PRESENT:

HONORABLE WILFRED FEINBERG

(USCA seal:  
NOV 20 1989)

HONORABLE THOMAS J. MESKILL

Circuit Judges

HONORABLE ALBERT W. COFFRIN

District Judge \*

-----X  
DANIEL KOZAK,

Plaintiff-Appellant,

- against -

89-6140

UNITED STATES DEPARTMENT OF AGRICULTURE,

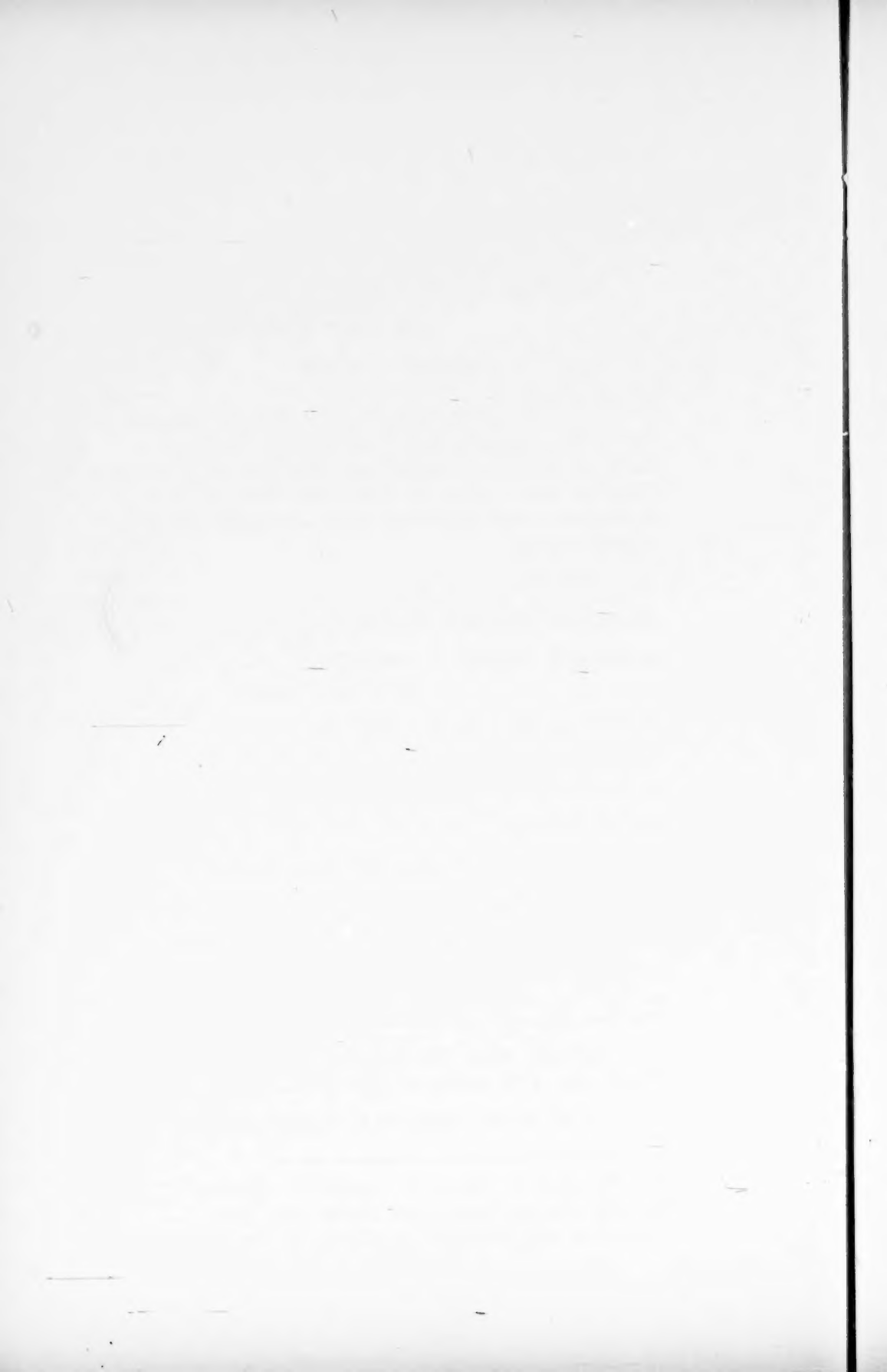
Defendant-Appellee.  
-----X

Appeal from the United States District Court for the Eastern District of New York.

This cause came to be heard on the

---

\* Honorable Judge W. Coffrin, Senior United States District Judge for the District of Vermont, sitting by designation.



Kozak v. U.S. Dept. Agriculture

89-6140

Page 2

---

transcript of record from the United States District Court for the Eastern District of New York, and was argued by appellant pro se and by counsel for appellee.

UPON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgement of said district court is AFFIRMED.

1. Plaintiff Daniel Kozak appeals from a judgement of the United States District Court for the Eastern District of New York, Jacob J. Mishler, J., dismissing his complaint after a bench trial.

2. We affirm substantially for the reasons stated by Judge Mishler in his memorandum and order, dated April 19, 1989.

3. The judgement of the District court is affirmed.

(signed)

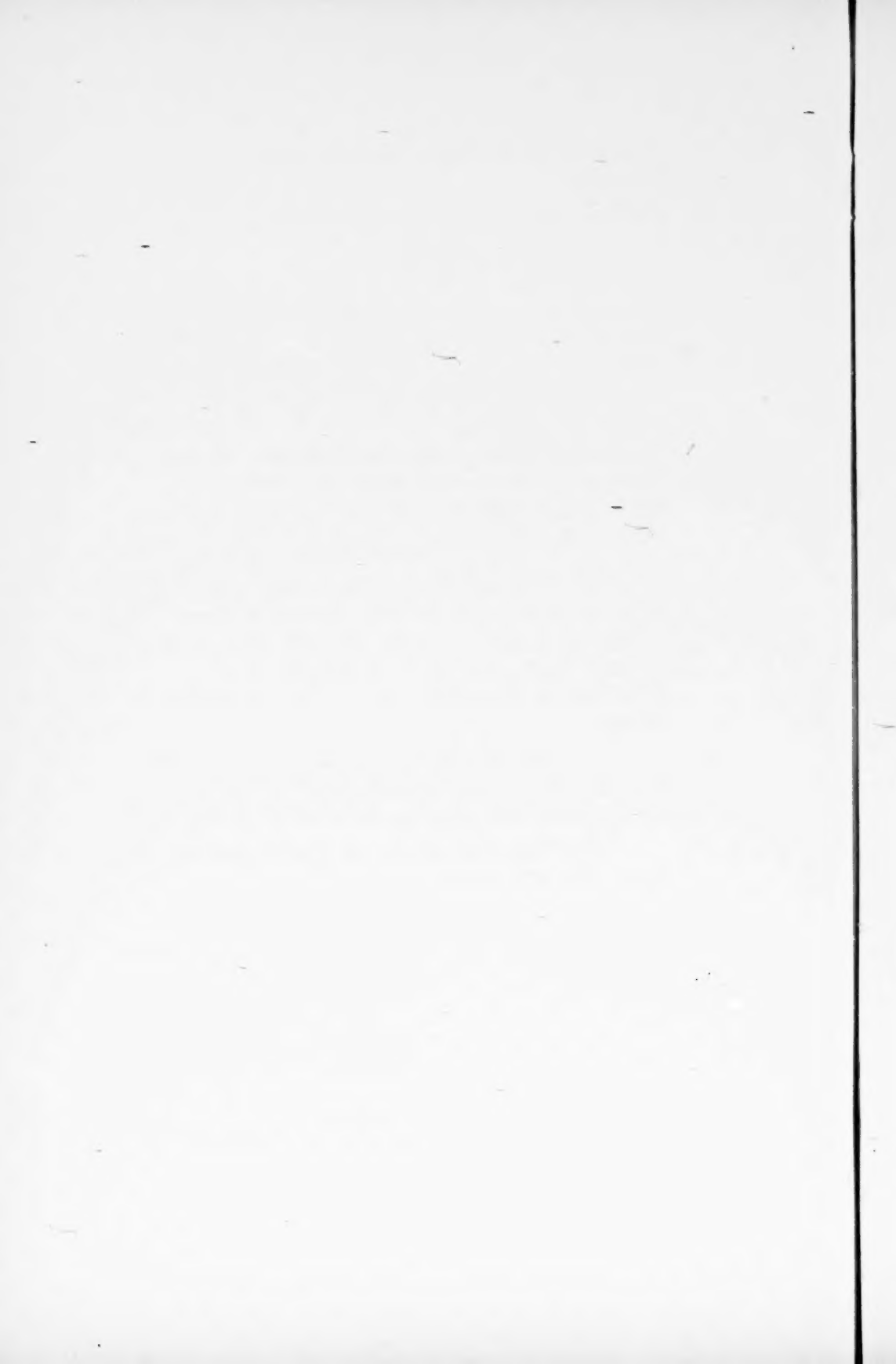
WILFRED FEINBERG

(signed)

THOMAS J. MESKILL

(signed)

ALBERT W. COFFRIN



Kozak v. U.S. Dept. Agriculture  
89-6140  
Page 3 \_\_\_\_\_

N.B. THIS SUMMARY ORDER WILL NOT BE  
PUBLISHED IN THE FEDERAL REPORTER  
AND SHOULD NOT BE CITED OR OTHERWISE  
RELIED UPON IN UNRELATED CASES BEFORE  
THIS OR ANY OTHER COURT.